Kentucky Law Journal

Volume 20 | Issue 2 Article 12

1932

Torts--Liability of a City for Defects in Streets

James William Hume
University of Kentucky

ing decisions is found in the terms of the instruments involved." One finds it easy enough to define the extent of liability in such a manner, but more difficult to discover the *fact*—the intention to benefit—from a mere promise which makes no mention of such intention *and without reference to extrinsic factual circumstances.* In the principal case the latter is complicated even further by the fact that the extent of the liability, the words of promise according to the court, is derived not from express words of promise, but from a promise constructed from what is apparently meant to be a definition of the extent of the liability of the promise made in an earlier part of the bond. The interesting question arises as to just how a promise to *indemnify* an owner against liability to materialmen could be made without giving the latter a right of action which would seem to be what the parties attempted to do in the principal case.

W. H. DYSARD.

TORTS—LIABILITY OF A CITY FOR DEFECTS IN STREETS.—Plaintiff, a small boy, was riding his pony at a street intersection in Paducah. A hole 3 to 5 inches deep and 8 or 10 inches wide caused the pony to fall whereby the plaintiff suffered injuries. The hole had been worn in the street at a point where the concrete gutter and asphalt joined, and the evidence showed that the city knew or should have known of the hole's existence. The plaintiff was not found to be contributorily negligent and was permitted to recover. The court held that a city was not an insurer of the safety of persons who traveled its streets, but that it was bound to maintain its streets in a reasonably safe condition for the character of travel for which they were maintained. That in the absence of reasonable care the city was liable for injuries resulting from defects in its streets, of which the city had notice, actual or constructive. *Paducah* v. *Konkle*, 236 Ky. 582, 33 S. W. (2nd) 608.

The case follows both the general rule in Kentucky, and the United States. In *Evans* v. *City of Atlanta*, 139 Ga. 433, 77 S. E. 378, the court held that a city was liable for injuries which proximately resulted from its failure to keep its streets in a reasonably safe condition for ordinary travel, either at night or day, provided the injured party was not guilty of contributory negligence. The case of *Stern* v. *International Railroad Co.*, 220 N. Y. 284, 115 N. E. 759, held that a city was liable for injuries resulting from a railway pole erected in the street, on the ground that it was unreasonably dangerous. *Howard* v. *City of New Orleans*, 159 La. 443, 105 So. 443, held that a city was liable for defective streets, even though as a general rule it was not liable for injuries occasioned in the exercise of its governmental functions. In *Shreve* v. *City of Fort Wayne*, 176 Ind. 347, 96 N. E. 7, the court ruled that a city must keep its traveled ways, and those indicated as for travel, in a reasonably safe condition. Some Kentucky cases that are in accord with the principal case of *City of Paducah* v. *Konkle*, *supra*, are: *City of Louisville* v. *Hough*, 157 Ky. 643, 163 S. W. 1101; *Bickel Asphalt Paving Co.* v. *Yeager*, 176 Ky. 712, 197 S. W. 417; *Tudor* v. *City of Louisville*, 172 Ky. 429, 189 S. W. 456.

Some of the questions raised by the problem of the principal case are: "What constitutes notice and the necessity of notice? What is a reasonably safe condition? Does contributory negligence on the part of the injured party bar recovery? The last question is not discussed in this paper.

A city is not liable without notice of the defects in its streets. Plaintiff was injured by stumbling over a bridge railing which had been thrown to the street, a few minutes before, by small boys. Held that the city was not liable unless the railing was so negligently constructed that such a result should have been anticipated in the exercise of ordinary care. *City of Ludlow* v. *De Vinney*, 185 Ky. 316, 235 S. W. 145. In *Tudor* v. *City of Louisville, supra*, the court held that a city must have actual or constructive notice of defects if it is to be liable. The case defined constructive notice as being a reasonable time in which the city by the exercise of ordinary care should learn of the defect. A somewhat different type of constructive notice was laid down in *Gnau* v. *Ackerman*, 166 Ky. 258, 179 S. W. 217. The city had granted a contractor permission to place material in the street to be used in building a house. Plaintiff, a small boy, was severely burned in a lime pit a few hours after the contractor had begun to slake lime. The city defended on the ground that it had no notice due to the short time the lime was being slaked before the plaintiff was injured. The court held, however, for the plaintiff and ruled that when a city authorizes an obstruction to be placed in a street it must take notice of the nature of the obstruction. The case of *City of Georgetown* v. *Groff*, 136 Ky. 662, 124 S. W. 888, held that if a city failed to give noitce of obstructions placed in the street by the contractor with authority of the city it would be jointly liable with the contractor for injuries occasioned thereby.

If the streets are maintained in a reasonably safe condition the city is not liable. In *Eagan* v. *City of Covington*, 166 Ky. 825, 179 S. W. 1026, the plaintiff's horse collided with a fire engine which had been left on the side of the street. More space was left than in ordinary streets. The accident happened in the daytime. The court held that the street was in a reasonably safe condition, and that the plaintiff, therefore, was not entitled to recover. Another case, *Varney* v. *City of Covington*, 155 Ky. 662, 160 S. W. 173, in which plaintiff was injured by slipping on ice, held that if the ice was not accumulated in such ridges or inequalities as to be likely to trip pedestrians the city was not liable.

That the city's liability is based on negligence is clearly shown by the following cases: The court held in *Cundiff* v. *City of Owensboro*, 193 Ky. 168, 235 S. W. 15, that a city is not liable for latent defects without notice. If the city exercises ordinary care in the maintenance of its streets and fails to discover a latent defect it is not liable since it is not negligent. *City of Paducah* v. *Ivey's Administrator*, 196 Ky. 484, 245 S. W. 4.

A recent Kentucky case held that a city's duty to keep sidewalks reasonably safe extended to every part thereof. *Louisville Railway Co.* v. *Jackey*, 237 Ky. 125, 35 S. W. (2nd) 28.

The problems of negligence, notice, reasonably safe conditions, and proximate cause are questions of fact arising in every case. After a study of the cases involving the above problems it will be seen that the principal case of *Paducah* v. *Konkle*, *supra*, is in accord with the general as well as the Kentucky rule; namely, that a city must exercise ordinary care in the maintenance of its streets or be liable for injuries occasioned by defects of which the city has notice.

JAMES WILLIAM HUME.

TORTS—RIGHT OF PRIVACY. Since the doctrine of the right of privacy was discussed pro and con in this Law Journal in the January, 1931, issue, three new cases have appeared to further complicate the situation. Two of them were decided in states which have already recognized the right of privacy, Kentucky and Georgia; but the third case, *Melvin* v. *Reid*, Cal. App., 297 Pac. 91, apparently brings within the select circle of those acknowledging the existence of such a right, the hitherto virgin state of California.

This California case, *Melvin* v. *Reid*, not only brings within the fold another state to give relief to those who allege that their rights of privacy have been violated, but also adds California to the list of states which in effect deny the right of privacy a common law standing. The court says:

> "In the absence of any provision of law, we would be loath to conclude that the right of privacy as the foundation for an action in tort, in the form known and recognized in other jurisdictions, exists in California." 297 Pac. 91 at 93..

By thus becoming authority for both proponents and opponents of the doctrine, the case loses most of its value for either side.

The seeming paradox in this case is explained away through the conscription of that indefinable constitutional guarantee to every man of the right to pursue happiness. This provision of the California Constitution, Section I of Article I, provides as follows:

> "All men are by nature free and independent, and have certain inalienable rights, among which are those of enjoying and defending life and liberty; acquiring, possessing, and protecting property; and pursuing and obtaining safety and happiness."

The capitalizing by the defendants of the unsavory incidents of the plaintiff's past life through the medium of cinematography, coupled with the use of her true maiden name, was held actionable as a direct invasion of this inalienable right to pursue and obtain happiness.

Laudable as is the result reached by the court, and damnable as the scurrilous practices of the defendant appear to be; it is believed that the result does not so logically follow from the provision quoted that other states having approximately the same, or similarly worded,